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The Widow's Share Evaluated

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NOTES AND COMMENTS

THE WIDOW'S SHARE EVALUATED

Underlying the New York system of marital rights[1] are two basic policy considerations; first, that the common law from an early time felt it was socially desirable to protect the widow for the balance of her life, and second, that the widow contributed at least indirectly to the accumulation of family wealth and therefore should receive her proportionate share as a matter of right.[2] From its effective date, September 1, 1930, section 18 has been viewed as a flexible provision, geared to equitable protection, rather than as a literal statement of law which has to be fulfilled to the letter but which requires no further compliance with its underlying philosophy.[3]

This broad, liberal and flexible approach taken by the courts, has been particularly significant in the evaluation of exactly what has been given to the surviving spouse. It is self-evident that the policy of the courts has had a far-reaching impact on the case history of marital rights, and, that a shift in the emphasis because of changing social conditions would result in diametrically-opposed decisions. Only by recourse to the cases themselves in light of the sociological and economic frame of reference in which they were decided can a full appreciation be attained.

A comprehensive view of the problem area is contained in one of the most recent New York decisions, *In re Shupack's Will*,[4] which considered the interaction between the widow's elective right and the structure of closely-held corpora-

1. N. Y. DECEDENT ESTATE LAW.

2. *In re Bommer's Estate*, 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936); "[T]he widow is not to be viewed as an almoner beseeching the bestowal of the crumbs from her master's table, but as a partner and aliquot co-owner of the family property which chances to rest in the legal ownership of the nominal head of the family partnership . . . . The widow has presumably performed her portion of the partnership labors, and is entitled to enjoy the fruits of her share of its capital in any manner to which her fancy may incline her, unhampered by the mortmain dictates of her deceased spouse that she must reside in a particular place or live in a specified manner under the penalty of a potential loss of a portion of the natural returns from her fair one-third of the total joint capital."

3. *In re Byrnes' Estate*, 260 N. Y. 465, 472, 184 N. E. 56, 58 (1933); *In re Bommer's Estate*, 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936); Legislative Document (1930) No. 69, page 87: It does not seem to the Commission to be desirable that the right to take the intestate share should be given to the surviving spouse in every estate, regardless of its amount. But while immediate necessities should be provided for, there should be some limitation by way of permitting the income only upon the balance of the intestate share to be paid over during the life of the surviving spouse. Therefore, in the larger estates, the Commission proposes to preserve to the testator a right to create a trust, with income payable to the wife, upon a principal equal to or greater than her intestate share; Legislative Document (1928) No. 70, page 13: In place of dower, the Commission recommends that there be substituted the right of the widow to take her intestate share against the provisions of the will. Thus disinheritence or unfair discrimination will be avoided. We do not propose to go as far as Pennsylvania did, because that Commonwealth permits the surviving spouse to elect to take the entire intestate share outright as against the terms of the will.

4. 1 N. Y. 2d 482, 136 N. E. 2d 513 (1956).

tions. The testator's assets consisted primarily of stock in six wholly-owned corporations, all of which apparently were profitable. The estate was to be divided into three equal parts which were to be held in trust for his wife, son and daughter respectively, the trustee having power to hold the property and securities in the same form in which received. The widow objected on the grounds that the trust in her favor was inadequate and illusory since, as a minority holder in close corporations, she would be at the mercy of antagonistic interests for the declaration and amount of dividends. As a result, there would be a good possibility of her receiving no income although the trust corpus appeared to be adequate in capital amount. The Court of Appeals split five-to-two in denying the widow a right of election.

The majority, looking to the purpose of section 18, said that it was not intended, and could not have been designed, to guarantee any particular income or standard of living; that it was not intended to assure the widow more than one-third of what her husband possessed at death. Any possibility of impairment of income due to hostile interests resulted from the character of the assets themselves, rather than from any attempt on the testator's part to deprive her of her legitimate share; *i.e.,* "illusory" is not to be identified with the possibility of no real income being produced. To illustrate its point, the court pointed out that shares in General Motors or United States Steel would have been far more desirable from the widow's point of view but that merely because this was not the case, the widow did not automatically receive an option to elect against the provisions made for her in the will. Rather, in defining "illusory transfers" which would give rise to the election, the court set forth only two classes of cases; first, those in which the duration of the trust was shorter than the life of the surviving spouse, and second, those in which the corpus was subject to invasion and reduction of amount. The majority admitted there was a danger that the widow would not receive an income proportionate to that received by her husband during life but pointed out that she would not be in a far different position if she took her share of the assets outright. From the very nature of the stock, she would have great difficulty in obtaining a price commensurate with its value, since it represented only minority interests in closely-held corporations.

Chief Judge Conway, joined in his dissent by Judge Desmond, argued that that the trust for the widow was illusory in fact though it appeared to meet the formal measure of section 18. Two considerations are illustrated by the dissent; that the trust must be "substantially" beneficial to the widow, and that the "possibility" of impairment provides a sufficient basis for a right of election. The divergence between this approach and that of the majority is immediately obvious. Any possibility of benefit to the widow would flow from the declaration of dividends on the corporate stock, and the majority interest in this stock was held by trustees who were required, by their fiduciary duty, to protect the interests of the

children.[5] When the children became of age and took the stock in their own right, they, or their assignees, had every right to protect their own best interests and these interests would probably be antagonistic to those of the widow, even granting that the most sound and honest business judgment would be exercised. The most the widow, through the trustee of her share, would possess would be an action to compel the payment of dividends[6] and thus her rights as a surviving spouse would amount only to the right to commence a lawsuit.

It was the "possibility" then which the dissent felt crearted an inadequate provision. The guiding principle of the legislators, security for the widow, demanded more than a possibility of income. Regardless of the bona fide intent of the husband in providing for this widow, the protection fell short of these minimal standards and therefore the widow should have been allowed to take her share outright. Whether the stock, held by her absolutely, would be of greater value is not the essence of the consideration. She might well be able to realize greater benefit from it in that form—and if not, the law would have provided its maximum measure of protection.

Before attempting to evaluate these two positions, it might be well to analyze the case law which forms the background, both for this particular elective problem and for related problems, highlighting the evolution of the concepts which *Shuback* embodies. In this way, any deviation from the decisional pattern will become more clear.

CORPORATE PROBLEMS

When dower rights constituted the statutory system for the protection of widow's rights in New York, the corporate device provided a convenient method by which a husband, before marriage and during marriage, could defeat his wife's interests. By conveying his real property to a corporation created for that purpose or by taking title in the name of the corporation and holding only the corporate stock, he insured that no real property was held in his own name.[7] This use as a

5. If the trustees were to elect themselves as directors, assuming they were so authorized, they would then be held to the standard set by the laws enacted for the government of corporations, required to protect the interests of the corporation in their capacity as directors. *See Matter of Doelger,* 254 App. Div. 178, 4 N. Y. S. 2d 334 (1st Dep't 1938) and *In re Edwards' Will,* 279 App. Div. 841, 109 N. Y. S. 2d 844 (4th Dep't 1952).

6. Exceptionally convincing evidence is necessary before a court will interfere in the internal management of a corporation by ordering the declaration of dividends. *Lockley v. Robie,* 276 App. Div. 291, 94 N. Y. S. 2d 335 (4th Dep't 1950), *modified* 301 N. Y. 371, 93 N. E. 2d 895 (1950). Some of the elements which may form the basis for such court action are fraud, bad faith, dishonesty or clear abuse of discretion. *See e.g. Gordon v. Ellimon,* 306 N. Y. 456, 119 N. E. 2d 331 (1954), 4 BUFFALO L. REV. 38 (1954); *City Bank Farmers Trust Co. v. Hewitt,* 257 N. Y. 62, 177 N. E. 309 (1931).

7. BEECHLER, ELECTIONS AGAINST WILLS 2-3 (1940).

shield became ineffective under section 18 which applied to the entire estate of the spouse, whether realty or personalty. But the corporate entity had not disappeared as a problem in the area of surviving spouses' rights. Closely-held family corporations have presented a common basis for attack under section 18.

In re Adler's Estate[8] illustrates the problem. There, the will established a trust for the life of the widow in one-third of the estate which was composed primarily of stock in six closed corporations. The trustee was authorized to hold the assets in the form in which received, an authority which the widow claimed failed to meet the standards of section 18. The Surrogate, in overruling the claim, held that the court was given power to protect the interests of the surviving spouse; that it would be a most unusual situation where, despite such a grant, the court would be powerless to control a trustee who sought to utilize a corporation to give less than the security or minimum protection contemplated by the legislature.

It should be noted here however that the trustees, while they control the voting of the stock, are not themselves the directors of the corporation.[9] The directors are not subject to the court's control under section 18(1)(h) and must further the interests of the corporation itself which could well result in a policy which would produce no income from the stock in the form of dividends.

In re Clark's Estate[10] provides a recent example. One-third of the net estate was placed in trust to pay income to testator's widow for life. The same trustees received the other two-thirds in trust for testator's children. The corpus consisted of stock in a family corporation which was to be held for the purpose of continuing the business so long as the trustees deemed it to be for the best interests of the estate. In arguing for her right to elect, the widow pointed out that the stock had paid no dividends for years, nor was there assurance that it would do so in the future, even if the corporate earnings justified the payment. The trustees themselves could not vote dividends since the power was in the hands of the corporate directors. Further, even though the trustees had a power of sale if they deemed a sale advisable, their judgment as to the advisability might be governed by the best interests of the children rather than the best interests of the wife. Thus the Appellate Division held that the trust for the widow must be a substantially beneficial one to defeat the right of election and that the trust here did not comply

8. 164 Misc. 544, 299 N. Y. Supp. 542 (Surr. Ct. 1937).

9. *United States Trust Co. v. Heye*, 224 N. Y. 242, 120 N. E. 645 (1918); *Robertson v. DeBrulatour*, 188 N. Y. 301, 80 N. E. 938 (1907).

10. 1 A. D. 2d 567, 151 N. Y. S. 2d 911 (4th Dep't 1956).

because the executors had failed to show that the trust was a substantial and income-producing one."[11]

Several years before, the court had granted a right of election to the widow in *In re Schrauth's Will*[12] where the testator had established a trust of all his property to pay the income to the widow for life. The trustees were directed to retain the primary asset, stock in the family corporation, unless they decided to sell and had the written consent of testator's five children. Despite its substantial book value, the stock had produced no income for some years and the business itself was run at a loss. The court held that despite the fact that testator had transferred his entire assets to the trust, the widow would very possibly receive next to nothing by way of income under the terms of the trust.[13]

Looking to some of the other problems which have arisen under section 18, transfers of less than a full and unemcumbered life interest are perhaps the most easily discovered. Thus the life estate may be limited to the widowhood of the surviving spouse. *In re Byrnes' Estate*[14] is perhaps the best known New York decision in this area, holding that such an estate was not a full life interest within the statutory intent. Underlying the decision was the realization that allowing such bequests to satisfy the statutory requirements would permit the testator to create life interests, subject to determination upon the failure to fulfill conditions

11. Judge Williams, dissenting, argued that section 18(1) (h) could be utilized to order a sale of the stock, thus avoiding the necessity for the granting of a right of election. See N. Y. DECEDENT ESTATE LAW §18(1) (h): The purported grant of authority in a will to an executor, administrator, c. t. a. or trustee or the successor of any of them (1) to act without bond or (2) to name his successor to act without bond or (3) to sell assets of the estate upon terms fixed by him or (4) to invest the funds of the estate in other than legal investments or (5) to retain in the assets of the estate investments or property owned by a testator in his lifetime or (6) to make distribution in kind or (7) to make a binding and conclusive fixation of values of assets in the distribution thereof or (8) to allocate assets either outright or in trust for the life of a surviving spouse or (9) to conduct the affairs of the estate with partial or total exoneration from the legal responsibility of a fiduciary, shall not be deemed either singly or in the aggregate to give to a surviving spouse an absolute right of election to take his or her intestate share; but the surrogate's court having jurisdiction of the estate, notwithstanding the terms of the will, shall have power . . . to direct and enforce . . . an equitable distribution, allocation or valuation of the assets, and to enforce the lawful liability of a fiduciary, and shall have power also to make such other order consistent with the provisions and purposes of this section as the court may deem necessary for the protection of the surviving spouse.

12. 249 App. Div. 846, 292 N. Y. Supp. 923 (2d Dep't 1937).

13. See also *In re Halperin's Estate,* 201 Misc. 763, 106 N. Y. S. 2d 96 (Surr. Ct. 1951). Testator's will established a trust of his entire estate in favor of his widow but provided that the trustees, in their discretion, were authorized to form a corporation and transfer to it all the assets of the estate in return for stock. In granting the widow's right to elect, the court pointed out that the corporation's business was carried on by its directors and officers, not by the trustees, and therefore the widow had no assurance of any income or substantial benefit.

14. 260 N. Y. 465, 184 N. E. 56 (1933).

virtually incapable of performance and thus to accomplish indirectly that which he was forbidden to do directly.

POWERS GRANTED TO TRUSTEES

One of the earliest questions which arose as a result of the trust device being used to provide the share required by section 18 concerned the effect of the broad scope of powers given to the trustees. *In re Curley's Estate*[15] considered a will which created a trust with income payable to the widow for life and granted the trustee substantially unlimited powers. He was allowed to act without bond, to name his own successor to act without bond, to invest in non-legals, to retain original investments, to distribute in kind, to fix values in distribution, to allocate assets and to conduct the affairs of the estate with partial or total exoneration from liability. Great consternation arose when the Appellate Division decided that such a trust was not the type contemplated by section 18, in that the share of the widow would be subject to the will of the trustee who could render it unfruitful. As a direct repercussion of this decision, the Legislature enacted section 18(1)(h),[16] providing that the grant of powers, enumerated in the paragraph, would not be deemed either singly or in the aggregate to give the surviving spouse an absolute right of election to take the intestate share. To protect the spouse, the surrogates were given power in an appropriate proceeding to make all proper directions to insure the performance of the trustee in a manner not antagonistic to the interests of the spouse. In two recent cases,[17] the conclusiveness of the interpretation of section 18(1)(h) is aptly illustrated. The wills had granted the trustees power to hold a part or all of the trust estate in cash from time to time or to purchase and hold from time to time non-income producing securities. In denying the respective widows' elections, the courts held that the provisions were squarely within the terms of the statute and that the trustees would be required to apply the rule of prudence and diligence in their conduct to render the assets productive for the beneficiaries.

In re Matthews' Will[18] indicated however that the power of the surrogate to enforce proper performance of duties by trustees does not extend to situations where the effect of the imposition would be a substantial rewriting of the will. It would not be the enforcement of the duties given the trustee but a complete

15. 269 N. Y. 548, 199 N. E. 665 (1935).

16. Draftsman's Note, Section 18(1)(h): . . . The purpose of this amendment is to correct the doubt created by the decision of the Appellate Division in *Matter of Curley* . . . . It is designed to vest in the surrogate's court having jurisdiction of the estate a supervisory power which will assure fair treatment to the surviving spouse but which will leave undisturbed provisions found commonly in wills. . . .

17. *In re Hubbell's Estate*, 302 N. Y. 246, 97 N. E. 2d 888 (1951); *In re Ryan's Estate*, 201 Misc. 632, 107 N. Y. S. 2d 641 (Surr. Ct. 1951).

18. 255 App. Div. 80, 5 N. Y. S. 2d 707 (2d Dep't 1938).

alteration of the duties and discretion given to him. Thus, in *In re Wittner's Estate*,[19] the testatrix had divided her estate into three equal parts, one-third being placed in trust for life for her husband. The trustee however was given discretion to invade corpus if need on the part of the husband or the children appeared to exist because of misfortune, sickness or any other reason. The husband succeeded in electing against the will because the provision for him was illusory and not substantially beneficial. Otherwise the testatrix would have been able to provide the requisite intestate share which then would have been subject to reduction, partially or entirely. For the surrogate to protect the spouse in such an instance would require changing the trustee's powers, not merely enforcing their proper exercise.

Surrogate Collins' well-reasoned opinion in *In re Sheppard's Estate*[20] emphasized the inability of the court to rewrite the will under the guise of enforcing equitable distribution, and added to the overall picture a policy statement as to the independent financial position of the widow. The testator there established a trust of substantially all his property, the net income of which was to be paid to the widow and son in equal shares for life. Before such income became payable, however, he made the gross income (or if insufficient, the principal) subject to an annual charge of $10,000 in favor of his sister and also to invasion by the trustee when, in his sole and uncontrolled discretion, he deemed it necessary or advisable to pay emergency expenses incurred by the widow or by the son or by any of testator's descendants. Quite properly, the surrogate held that the power in the trustee was so broad that he could destroy effectively both the income and the principal to the detriment of the widow. To protect the widow, the terms of the will would have to be altered substantially; the power to direct and enforce an equitable distribution, allocation and/or valuation of the assets would not extend this far. The substantially independent situation of the widow, based in part on large amounts given to her by the testator during life, was held to be an entirely immaterial consideration in determining her rights under section 18.

The essential element in these cases is the fact that the power given to the trustee is potentially destructive of the widow's share, depleting and jeopardizing it and, at least, rendering the income and principal insecure. *In re Meyer's Estate*,[21] a case which concerned an unrestricted discretion in the trustee to defer payments of legacies, followed the pattern established in *Matthews* and *Sheppard* and preserved the widow's right of election, holding that the provisions must be construed

19. 301 N. Y. 461, 95 N. E. 2d 798 (1950).
20. 189 Misc, 367, 71 N. Y. S. 2d 340 (Surr. Ct. 1947).
21. ———Misc.———, 129 N. Y. S. 2d 279 (Surr. Ct. 1954).

strictly in favor of the surviving spouse within the meaning of the *Byrnes*[22] rationale.

The unusual fact situation in the recent decision, *Estate of Edwards*,[23] highlights the extent of the surrogates' powers over trustees. The will established a trust for the widow in one-third of the net estate, the corpus to equal her intestate share as defined in the Decedent Estate Law. Sixty percent of the estate was made up of stock in a close corporation which the executors were to attempt to sell within six months. If they were not able to do so, they were to cause the corporation to be liquidated and to apportion stock, extraordinary and liquidating dividends between principal and income as they saw fit. The widow alleged that this constituted a fraud on her rights since the discretion of the executors might be exercised to allocate all of the liquidating dividends to principal. Surrogate Collins however rejected her contenton, holding that section 18(1)(h) gave him the power to enforce an equitable distribution of assets. The executors were held to a standard of reasonable care, diligence and prudence, and the widow's rights would not in fact be jeopardized by the discretion given to them. Since the widow would be assured of her statutory share, the fact that the decedent did not dispose of this property in a manner which she considered fair could not form the basis of an absolute right of election.

ESTATE TAX BURDEN

The *Edwards* case also indicates another ground upon which section 18(1)(d) has been called into play, *i.e.*, the effects of the estate tax burden on the widow's share. Section 124, Decedent Estate Law,[24] provides for the apportionment of estate taxes in the absence of a contrary direction in the will. The widow alleged that section 18 entitled her to her share in trust or otherwise as in intestacy, the intestate share qualifying for the marital deduction and resulting in no

22. *In re Byrnes' Estate, supra* note 12; In adopting the new section 18, as received from the hands of the commission, the Legislature announced its intention to be 'to increase the share of a surviving spouse in the estate of a deceased spouse, either in case of intestacy or by an election against the terms of the will of the deceased spouse thus enlarging property rights of such surviving spouse,' and stated that 'such provisions shall be liberally construed to carry out such intention.'

23. ———Misc.———, 152 N. Y. S. 2d 7 (Surr. Ct. 1956).

24. N. Y. DECEDENT ESTATE LAW §124; . . . the amount of the tax, except in a case where a testator otherwise directs in his will, and except in a case where by any instrument other than a will, hereinafter called a "non-testamentary instrument", direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such non-testamentary instrument, shall be equitably apportioned among the persons interested in the gross tax estate whether residents or non-residents of the state to whom such property is or may be transferred or to whom any benefit therein accrues, . . . in accordance with the rules of apportionment herein stated, and the persons benefited shall contribute to the tax the amounts apportioned against them. See also *In re Wolf's Estate*, 307 N. Y. 280, 121 N. E. 2d 224 (1954), 4 BUFFALO L. REV. 85, 86 (1954); noted on Appellate Division level, 3 BUFFALO L. REV. 328, 329 (1954).

tax imposion on her. In contrast, the trust established by the will did not qualify for the marital deduction because she was given no general power of appointment and therefore, her trust was made to bear its ratable share of tax, being thus reduced below the statutory amount. Surrogate Collins denied the argument, pointing out that, in a case where taxes are to be apportioned, the right of election extends to one-third of the net estate after the deduction of debts and funeral and administrative expenses and before the deduction for estate taxes. Rather, the widow was required only to bear her fair part of the taxes.

Less than four months before the *Edwards* decision, Surrogate Collins was faced with a similar claim in *In re Ruppert's Estate*.[25] The will which made no mention of estate tax allocation established a trust for the widow in a capital amount greater than her intestate share. The trust however did not qualify for a marital deduction. The widow alleged that the principal of her trust after the imposition of her apportioned share of taxes would be less than her intestate share which would have been tax-free. Surrogate Collins however pointed out that the "intestate share" as used in section 18 did not refer to the share she would have received in an intestate distribution after all estate taxes had been apportioned. Rather, estate taxes are not considered until after the net estate and the widow's share as in intestacy have been computed.

It was again Surrogate Collins who was faced with an attempted election in *In re Campbell's Estate*[26] where the will directed the executors to pay all estate taxes as a general estate expense and to make no apportionment against any gift or devise. The purpose of the direction was to insure that certain pecuniary legacies would be paid without any imposition of tax. A trust was established in one-third of the net estate in favor of the widow, the other two-thirds containing trusts and outright bequests. The widow asserted that her intestate share would have been one-third before deduction of taxes while the trust corpus would be only one-third after deduction of taxes, since her trust would not qualify for the marital deduction. In denying this claim, the Surrogate indicated that the widow's trust would bear only its ratable one-third of the tax burden. The trusts in the other two-thirds would bear the balance, those trusts carrying the share attributable to the exempted specific and pecuniary legacies. This result followed from the division of the estate after taxes and the payment of all such bequests from the two-thirds share. Whether her intestate share was computed as one-third of the net estate after taxes or as one-third before, subject to her pro rata share of taxes, the monetary result would be the same. She was paying only her equitable part of the tax burden.

It is interesting to speculate what result would have followed in *Campbell*

25. 1 Misc. 2d 1072, 148 N. Y. S. 2d 541 (Surr. Ct. 1955).
26. ———Misc.———, 156 N. Y. S. 2d 15 (Surr. Ct. 1956).

had the widow's share been the only fractional share and the specific legacies constituting the balance had been exempted from tax payment by the testamentary directions. Whenever the widow's share was made to bear any part of the tax burden, not strictly attributable to its own monetary value, it would seem highly probable that the court would be forced to arrive at a different conclusion.

CONCLUSION

Looking back then to the two approaches in *Shupack* which began this discussion, in light of the background decisions, one wonders if the dissent does not come closer to the spirit of the Commission whose recommendations led to the enactment of section 18. The majority opinion represents a very realistic approach in its conclusion that the widow had received her full share of everything that her husband possessed. And it is very possible that the majority represents a revaluation of policy in the area of marital rights. What then would lay behind such a consideration?

Socio-economic conditions have undergone drastic changes since the 1927-1929 period when the Commission was considering possible alternatives to dower rights. Truly adequate insurance protection is much more of a reality today for the great mass of Americans. Social Security coverage has been increased to realistic levels which lessen the danger of widows being left destitute. Modern pension plans protect the surviving spouse in case of her husband's death. Joint ownership of the family assets and joint bank accounts with survivorship rights are utilized widely. These are things which are not reflected in the assets of a husband's estate, and yet they offer a very genuine protection for the widow. They represent great advances in a period of less than thirty years. The widow who formerly could find protection only under section 18 may now be very comfortably supported by regular income payments, insured by her deceased husband's utilization of the various means set forth.

This of course is not to suggest that the basic policy of the Commission has been abandonned by the courts or that it should be abandonned. The rights of a surviving spouse as a co-owner of the family assets should receive the utmost consideration, and the necessity of protecting a widow who has been denied fair support should not be doubted. Neither, however, should the courts stop seeking methods to allow maximum flexibility in estate planning, utilizing economic and social advances in conjunction with policy choices as to the support of surviving spouses. The question is essentially one of approach—an approach which is particularly critical for the husband who controls a closely-held corporation and who wishes to establish a realistic testamentary support plan for both his widow and his children.

The problems arising under section 18 have been limited considerably in its short history. But the few areas in which issues arise still are the same areas in which the policy choice of the judiciary is most critical. The division between the majority and dissent in *Shupack* represents an accurate measure of the two philosophies which the practitioner must recognize in choosing his course of draftsmanship, whether it be in a comparable estate problem or in one entirely different. The policy choice of the courts in interpreting section 18 must be flexible and free to progress with the sociological and economic development of the people. Whether any policy change is forthcoming remains to be seen[27] but every indication would seem to point toward it.

Richard G. Birmingham

STATUTORY INNOVATION IN THE OBSCENITY FIELD

One of the most active areas in the field of constitutional law at the present time is concerned with legislative attempts at raising the nation's moral standards or, perhaps, preventing the lowering of the present standards[1] through the suppression of books which are considered to be a bad influence on the reading public. The cause of the present interest is undoubtedly the presence upon the scene of the "horror comic" age and the "paper bound book" era.[2] In attempting to suppress the objectionable matter, the New York courts have had resort to section 1141 of the Penal Law.[3] However the threat of fines and imprisonment did not result in the removal of the offending books from the stands and

27. *In re Clark's Estate supra* note 8; This case has been appealed to the New York Court of Appeals where the disposition of the contentions may provide some indication of policy change in keeping with the rationale of *Shupack*. If the *Shupack* case is followed, both the *Clark* and the *Schrauth supra* note 12) cases would seem to be overruled.

1. H. R. REP. No. 2510, 82d Cong. 2d Sess. (1952).

2. AMERICAN BOOK PUBLISHERS' COUNCIL, BULLETIN No. 377. See *Bok, Censorship and the Arts*, in CIVIL LIBERTIES UNDER ATTACK, 117-120 (1951). Activity in this field has not been restricted to the legislatures. Many private groups have entered the censorship scene using persuasion and boycott as their weapons. DRIVE FOR DECENCY IN PRINT, REPORT OF BISHOPS' COMMITTEE SPONSORING THE NATIONAL ASSOCIATION FOR DECENT LITERATURE (1939). For an interesting discussion and cricital analysis of the methods and effectiveness of the National Association for Decent Literature see Harper's, Oct. 1956, p. 14-20 and the answer found in America, Nov. 3, 1956, p. 120-123.

3. This section attempts to bring within its scope all forms of dissemination through which obscene matter might get to a susceptible public. It deals with the sale, loan, gift, distribution, showing or transmitting of any "obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, phonographic record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such character."